

IN THE UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE, COOKEVILLE DIVISION

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4 ILIGHT TECHNOLOGIES,)

5 Plaintiff,)

6)

7 v.) CASE NO. 2:06-0025

8)

9 FALLON LUMINOUS PRODUCTS,)

10 Defendant.)

12 **TRANSCRIPT OF PROCEEDINGS**

13 VOLUME IX

14 -

15

16 DATE: April 30, 2009

17 TIME: 9:00 A.M.

18 BEFORE: HONORABLE WILLIAM J. HAYNES, JR.

19 And a Jury

20

21

22 COURT REPORTER: PEGGY G. TURNER
23 OFFICIAL COURT REPORTER
24 801 BROADWAY, ROOM A-837
NASHVILLE, TENNESSEE 37203
PHONE: (615) 726-4893
Peggy_Turner@tnmd.uscourts.gov

A P P E A R A N C E S:

2 For the Plaintiff: Timothy J. Vezeau
3 Stephen Price
4 Melissa Hunter
John Scruton
William Ferrell

5 For the Defendant: Mark Kittredge
6 Jonathan Rose
7 Samuel Lipshie
Brandy McMillion
Douglas Sawyer

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11:42:47 1

P R O C E E D I N G S

11:42:50 2 THE COURT: Counsel, I have the following note from
3 the jury:

11:42:55 4 Could we receive a copy of a timeline presented in the
5 plaintiff's closing argument?

11:43:02 6 My proposed response to this is that the timeline
7 would be what would be referred to as a visual aid and was not
8 admitted into evidence. And to the extent that it was shown,
9 it was that visual aids are to assist them in understanding
10 the evidence, and that they will have to rely upon their own
11 recollection of the evidence because the visual aid itself is
12 not evidence. Any objection?

11:43:31 13 MR. VEZEAU: Not from the plaintiff, Your Honor.

11:43:36 14 THE COURT: You can bring the jury in, Mr. Marshal.
15 Ask one of the Marshals to bring the jury in.

11:44:00 16 (Jury in.)

11:44:18 17 THE COURT: You can be seated. Ladies and gentlemen
18 of the jury, the Court has shared the note that you sent me
19 with counsel and the parties. Your note is:

11:44:29 20 Could we receive a copy of the timeline presented in
21 the plaintiff's closing argument.

11:44:35 22 what you saw -- the timeline is what we refer to as a
23 visual aid. A visual aid is something that counsel uses to
24 assist the jury in following the evidence. However, the
25 visual aid itself is not evidence and, therefore, I can only

1 tell you to rely upon your recollection of the evidence that
2 was referred to during the presentation of the visual aid, but
3 I cannot give you the visual aid because the visual aid itself
4 is not evidence. Does that satisfactorily answer your
5 question?

11:45:11 6 I will send you back to retire and let you all tell
7 the Court when you want to take lunch. If you all want to
8 work during lunch, we can send out for lunch or if you want to
9 -- whenever you all want to take a lunch break, you will
10 probably have to go under the escort of a Marshal at this
11 point, and he will take you to the designated place that you
12 all want to go.

11:45:35 13 Send a note through the Marshal as to what you all
14 want to do. You are free to return to the jury room.

11:45:54 15 (Jury out.)

11:46:01 16 THE COURT: Any responses to -- any objections to what
17 the Court said?

11:46:04 18 MR. VEZEAU: No, Your Honor.

11:46:05 19 MR. KITTREDGE: No, Your Honor.

11:47:12 20 THE COURT: We're in recess.

12:12:50 21 (Recess.)

12:12:54 22 THE COURT: All right. This is the note I have
23 received:

12:13:00 24 We would like to order pizza and mild wings.

12:13:05 25 If you want me to read the rest of the menu, I will.

1 It looks like they are working through lunch, obviously. But
2 you all can go, and I would suggest that you all come back
3 around 3:00. We'll just sort of see where we are. But if you
4 all want to know the rest of the menu, I will give it to you.

14:05:37 5 (Recess until 2:05.)

14:05:38 6 THE COURT: I have the following note:

14:05:41 7 we have come to a decision.

14:05:45 8 I'm going to ask the Marshal to bring the jury in. I
9 will review with the foreperson the note that I have been
10 handed, ask if they have made a decision, have the verdict
11 form handed to me, I will review it and return it to the
12 foreperson to have it read. I will then poll the jury and
13 then give them, before they leave, the information under our
14 local rule that no one may contact them regarding their
15 service as a juror in this case without an order of the Court.

14:08:29 16 You can bring the jury in, Mr. Marshal.

14:08:29 17 (Jury in.)

14:08:53 18 THE COURT: You can be seated. Ladies and gentlemen
19 of the jury, I received of a note of your foreperson that you
20 have come to a decision. Is that correct?

14:09:00 21 THE FOREPERSON: Yes.

14:09:02 22 THE COURT: If you would pass that verdict form to the
23 Marshal.

14:09:16 24 All right. I'm going to return the verdict form to
25 the foreperson, ask the foreperson to read each question and

1 the jury's response thereto.

14:09:28 2 THE FOREPERSON: Question. Has iLight established by
3 a preponderance of the evidence that Fallon infringed any of
4 the following claims of iLight's '238 Patent?

14:09:39 5 Claim 8. Yes.

14:09:42 6 Claim 25. Yes.

14:09:44 7 Has iLight established by a preponderance of the
8 evidence that Fallon infringed any of the following claims of
9 iLight's '262 Patent?

14:09:52 10 Claim 1. Yes.

14:09:56 11 Claim 8. Yes.

14:09:57 12 Has iLight established by a preponderance of the
13 evidence that Fallon infringed any of the following claims of
14 iLight's '970 Patent?

14:10:06 15 Claim 1. Yes.

14:10:10 16 Claim 5. Yes.

14:10:14 17 Claim 8. Yes.

14:10:16 18 Has Fallon established by clear and convincing
19 evidence that any of the following claims of iLight's '238
20 Patent is invalid as anticipated?

14:10:24 21 Claim 8. No.

14:10:28 22 Claim 25. No.

14:10:31 23 Has Fallon established by clear and convincing
24 evidence that any of the following claims of iLight's '238 is
25 invalid as obvious?

14:10:38 1 **Claim 8. No.**

14:10:40 2 **Claim 25. No.**

14:10:42 3 Has Fallon established by clear and convincing

4 evidence that any of the following claims of iLight's '238

5 **Patent is invalid as indefinite?**

14:10:49 6 **Claim 8. No.**

14:10:52 7 **Claim 25. No.**

14:10:54 8 Has Fallon established by clear and convincing

9 evidence that any of the following claims of iLight's '262

10 **Patent is invalid as anticipated?**

14:11:03 11 **Claim 1. No.**

14:11:04 12 **Claim 8. No.**

14:11:07 13 Has Fallon established by clear and convincing

14 evidence that any of the following claims of iLight '262

15 **Patent is invalid as obvious?**

14:11:13 16 **Claim 1. No.**

14:11:15 17 **Claim 8. No.**

14:11:17 18 Has Fallon established by a clear and convincing

19 evidence that any of the following claims of iLight's '262

20 **Patent is invalid as indefinite?**

14:11:28 21 **Claim 1. No.**

14:11:30 22 **Claim 8. No.**

14:11:35 23 Q. Has Fallon established by a clear and

24 convincing evidence that any of the following claims of

25 iLight's '970 is invalid as anticipated?

14:11:44 1 **Claim 1.** No.

14:11:45 2 **Claim 5.** No.

14:11:46 3 **Claim 8.** No.

14:11:49 4 Has Fallon established by clear and convincing

5 evidence that any of the following claims of iLight's '970

6 Patent is invalid as obvious?

14:11:57 7 **Claim 1.** No.

14:11:58 8 **Claim 5.** No.

14:11:59 9 **Claim 7.** No.

14:12:01 10 Has Fallon established by clear and convincing

11 evidence that any of the following claims of iLight's '970

12 Patent is invalid as indefinite?

14:12:08 13 **Claim 1.** No.

14:12:09 14 **Claim 5.** No.

14:12:13 15 **Claim 8.** No.

14:12:16 16 THE COURT: Is there an additional question on

17 willfulness?

14:12:20 18 THE FOREPERSON: Shall I read the damages?

14:12:22 19 THE COURT: Yes.

14:12:24 20 THE FOREPERSON: If you have found infringement by

21 Fallon of any one or more claims of the '238 Patent, '262

22 Patent, and/or '970 Patent, and if you have found that Fallon

23 failed to prove that each of such infringed claims is invalid

24 and/or unenforceable, then state the amount of damages, if

25 any, you find that Fallon should pay to iLight for Fallon's

1 infringements.

14:12:49 2 we find \$2.0 million.

14:12:51 3 willfulness.

14:12:56 4 If you have found infringement of any of the claims of
5 the patents, has iLight established by clear and convincing
6 evidence that such infringement was willful? Yes.

14:13:07 7 THE COURT: All right. If you will return the verdict
8 form to the Marshal.

14:13:10 9 Upon your oath as a juror, is that your verdict, Juror
10 Number 1?

14:13:11 11 THE JUROR: Yes.

14:13:13 12 THE COURT: Juror Number 2?

14:13:13 13 THE JUROR: Yes.

14:13:14 14 THE COURT: Juror Number 3?

14:13:14 15 THE JUROR: Yes.

14:13:17 16 THE COURT: Juror Number 4?

14:13:17 17 THE JUROR: Yes.

14:13:19 18 THE COURT: Juror Number 5?

14:13:19 19 THE JUROR: Yes.

14:13:21 20 THE COURT: Juror Number 6?

14:13:22 21 THE JUROR: Yes.

14:13:23 22 THE COURT: Juror Number 8?

14:13:24 23 THE JUROR: Yes.

14:13:25 24 THE COURT: All right. Ladies and gentlemen, the
25 Court will enter judgment in accordance with your verdict.

1 The Court is going to advise you that under our rules no one
2 may contact you regarding your service as a juror in this
3 court without an order of the Court. And if anybody attempts
4 to do so, if you will call the United States Marshal's Office,
5 the Court will take appropriate action.

14:13:48 6 The Court will ask you, however, to remain in this
7 small room here for just a while. There is something I need
8 to go over with counsel and the parties. So you are not
9 excused yet. If you will just wait there a few minutes.

14:14:10 10 (Jury out.)

14:14:22 11 THE COURT: I just wanted to get on the record, do the
12 parties agree that the amount of damages for the willfulness
13 finding of the jury is an issue for the Court?

14:14:35 14 MR. VEZEAU: Yes, Your Honor. Any increase is for the
15 Court up to three times. That's what the statute says.

14:14:41 16 THE COURT: I just want to be sure.

14:14:41 17 MR. KITTREDGE: That's correct, Your Honor.

14:15:10 18 THE COURT: Okay. If you will bring the jury back in.

14:15:18 19 (Jury in.)

14:15:21 20 THE COURT: Ladies and gentlemen of the jury, you are
21 now free to go, but always with us there is a little
22 paperwork. We need to give you your attendance letters for
23 your employment.

14:15:40 24 You are free to go. Thank you.

14:15:43 25 THE CLERK: All of them don't need one. Their name is

1 at the top.

14:16:02 2 THE COURT: Have we got everybody? Did we get
3 everybody? Okay. You are free to go. Thank you so much.

14:16:30 4 (Jury out.)

14:16:34 5 THE COURT: You all can be seated. Do you all want
6 any further argument on the issue of damages on the
7 willfulness finding?

14:16:53 8 MR. VEZEAU: Your Honor, it has been a long trial. I
9 think you heard the evidence. I'm happy to try to summarize
10 it for you again, but I don't think we really need to unless
11 it would be helpful for the Court.

14:17:05 12 THE COURT: I just want to give everybody an
13 opportunity.

14:17:10 14 MR. VEZEAU: No, I think the jury found willfulness
15 based on the evidence. We thought the evidence was clear and
16 convincing. I think the jury has found the same, that indeed
17 this conduct on the part of Fallon was deliberate, it was
18 willful, it was calculated to ignore iLight's rights, even
19 though iLight attempted early on to engage in the dialogue and
20 was ultimately forced a year later to file suit in order to
21 bring this conduct to some resolution, we know we have been
22 involved for some time in this litigation and tied up the
23 Court.

14:17:45 24 I believe the totality of the evidence certainly
25 supports an increase. And candidly, I believe the amount of

1 increase, if any, is solely in the Court's hands, where it
2 belongs.

14:17:54 3 THE COURT: All right.

14:17:57 4 MR. KITTREDGE: The jury has spoken, so there is no
5 question about willfulness to be considered at this point,
6 Your Honor, and I won't contest otherwise. However, I do
7 believe my client's behavior has been reasonable. Even Mr.
8 Cleaver testified that a reasonable person in the sign
9 industry could have drawn exactly the conclusions that Mr.
10 Nelson testified to that he did.

14:18:19 11 I would also submit, Your Honor, that there is a
12 period for post-trial motions, and there are going to be some
13 here, and I would ask you to reserve this issue until we have
14 a final judgment, which will be after that post-trial motion
15 period.

14:18:39 16 THE COURT: Well, should the Court decide all matters
17 before we have the post-trial motion, so if there is any issue
18 on willfulness, that --

14:18:53 19 MR. KITTREDGE: I don't think that is necessary or
20 even appropriate, Your Honor.

14:18:58 21 MR. VEZEAU: Your Honor, I'm not sure how the Court
22 approaches this in other cases. We'll certainly be guided by
23 the Court. There is also the issue of prejudgment interest,
24 which I know the Court has reserved on that. So that's
25 another issue we ask -- I don't know if the Court wants

1 briefing on that, if you need briefing on that, or if the
2 Court just deals with that on its own.

14:19:23 3 THE COURT: Well, I'm familiar with prejudgment
4 interest in the Sixth Circuit. I don't think I need any
5 briefing. If you all feel you need briefing, I always give
6 the lawyers an opportunity to have their say.

14:19:39 7 MR. VEZEAU: we had thought we were familiar with Your
8 Honor's approach to prejudgment interest and had addressed
9 that earlier on. We know the Court decided to leave that out,
10 and we certainly were comfortable with that. So I'm
11 comfortable with the Court just handling that.

14:19:56 12 MR. KITTREDGE: I think that exemplifies why I do
13 think we need to brief this issue, Your Honor.

14:20:02 14 THE COURT: Prejudgment interest?

14:20:04 15 MR. KITTREDGE: Yes. We would like to brief that
16 issue. I would like an opportunity to brief whether or not
17 enhanced damages and willfulness are appropriate here, and
18 there are a few other issues that will be addressed before we
19 get to final judgment, and we should do all that in the
20 papers.

14:20:20 21 THE COURT: With the jury's verdict, the issue is how
22 much, isn't it?

14:20:28 23 MR. KITTREDGE: How much prejudgment interest?

14:20:32 24 THE COURT: No, on the punitive -- on the enhancement
25 for the willfulness finding.

14:20:37 1 MR. KITTREDGE: That's correct.

14:20:51 2 THE COURT: Now, it seems to me that if we're talking
3 about Rule 59 motions, I think the Court's judgment ought to
4 be in it, that way the Rule 59 motion can raise any of the
5 issues in the Court's judgment is to have only a portion
6 entered and not the other. Now, if the issue is prejudgment
7 interest, I will allow you all to brief that, because -- or
8 the Court -- that could be part -- whatever the Court does on
9 prejudgment interest could be raised in the motion to alter or
10 amend if the defendant is not satisfied.

14:21:42 11 MR. KITTREDGE: I understand what you're saying, Your
12 Honor.

14:21:54 13 THE COURT: I'm inclined to go ahead and decide the
14 issues and then, if this is any -- I mean, given the fact that
15 there are going to be post-trial motions anyway, as you
16 stated, then all those issues can be raised in post-trial
17 motions, and we will deal with them at one time.

14:22:14 18 MR. KITTREDGE: I understand what you're saying.

14:22:17 19 THE COURT: Is there any objection?

14:22:19 20 MR. VEZEAU: Certainly no objections, Your Honor. The
21 other issue is injunctive relief, which, of course, is
22 reserved to the Court. In these cases, we think it is
23 appropriate, and would like to -- I think in that instance we
24 probably should submit something to the Court on that so the
25 Court can take a look at that and see if an injunction is

1 appropriate.

14:22:43 2 THE COURT: Well, in light of the evidence of
3 continuing production, and the issue -- and the jury's finding
4 on willfulness, the Court believes that an award of injunctive
5 relief is appropriate.

14:22:55 6 MR. VEZEAU: Thank you, Your Honor.

14:23:00 7 THE COURT: Now, as to the scope of the -- there was
8 an issue raised earlier concerning patent laws not extending
9 beyond the United States, which is true, but it says -- the
10 Supreme Court decision quoted by the federal circuit says,
11 wholly outside the United States. So that -- and given the
12 fact that the statute prohibits importing means that any
13 decisions from the Court's perspective, an act done within the
14 United States would be subject to injunctive relief because
15 the defendant is in the United States.

14:23:46 16 So if the parties want time to draft a proposed order
17 on injunctive relief, I will give you all time to do it, but
18 in light of the proof and the jury's findings, I think
19 injunctive relief is appropriate.

14:24:00 20 MR. VEZEAU: Thank you, Your Honor. We will draft a
21 draft order and submit it to the defendants.

14:24:04 22 THE COURT: Because of the potential extraterritorial
23 effect, I think I will let the parties have an opportunity to
24 comment on that.

14:24:11 25 MR. VEZEAU: Yes, Your Honor. Of course.

14:24:13 1 MR. KITTREDGE: Your Honor, can I address the issue
2 about the injunction briefly? As Mr. Vezeau said initially,
3 he thought Your Honor should receive some submissions before
4 you enter an injunction. And if I might approach, the reason
5 for that is because of the Supreme Court decision in 2006
6 called eBay v. MercExchange, where the Supreme Court overruled
7 the federal circuit and held an automatic injunction would be
8 not appropriate, that the Court has to go through the
9 traditional equitable balancing test to determine if it is
10 appropriate, and has to specifically consider a couple of key
11 factors which we just really have not had evidence on yet, and
12 that is whether or not there is really irreparable harm to the
13 plaintiff, and more importantly balancing the hardship between
14 the parties.

14:25:05 15 This is why you do need to receive some submissions
16 from us, and after you receive those submissions you will be
17 able to decide, decide on those papers. And you very well
18 may, you may decide you want to hear a witness or two, or read
19 a couple of declarations. But we should pause and go through
20 this process just a little bit more carefully to make sure we
21 get it right.

14:25:29 22 THE COURT: Well, when I say injunctive relief, the
23 federal circuit case I was referring to talked about the
24 extraterritorial effect of limitations on patent laws. But
25 the factors here are automatically considered by the Court.

1 If you are going to continue to produce these items that the
2 jury has found to be willful violations of the statute, it
3 seems to me that that is the type of repetitive conduct for
4 which the remedies at law have limitations.

14:26:15 5 Now, in terms of the balance between the plaintiff and
6 the -- and I think that a violation of the patent laws can
7 constitute irreparable injury, because it undermines the
8 system of protection for patents. I think the public interest
9 is served by original patents. So -- I mean, at least for me,
10 it's an automatic sort of analysis.

14:26:50 11 Now, as to whether the precise scope of it -- that's
12 the reason I'm giving the parties an opportunity to make
13 submissions on that, to make sure that it's tailored so that
14 it does not have -- it is not an attempt to extend
15 extraterritorially.

14:27:16 16 Now, since there are a lot of motions -- since there
17 are going to be these post-trial motions, to the extent that
18 you think that the Court should reconsider an award of
19 injunctive relief, you can make those contentions in the
20 post-trial motions.

14:27:30 21 MR. KITTREDGE: And then let me just say one more
22 thing and be very brief on it, Your Honor. Your instinctive
23 reaction as a judge --

14:27:37 24 THE COURT: No, it's not reaction, it's reaction to
25 sitting here hearing eight days of testimony, hearing closing

1 arguments, hearing arguments on the motions for judgment as a
2 matter of law. I've read briefs on this, I have had
3 submissions and oral argument on motions for summary judgment.
4 I mean, I think I understand what the issues are.

14:28:04 5 MR. KITTREDGE: I believe you do, too, Your Honor.

6 However, --

14:28:09 7 THE COURT: Not to mention the jury instructions.

14:28:11 8 MR. KITTREDGE: However, that was the way courts
9 regularly granted permanent injunctions following trials up
10 until 2006. What the Supreme Court said in Ebay v.
11 MercExchange is that you don't do that automatically at that
12 point. You do have to step back and do that balancing test.
13 And I think you should take some time and let us submit those
14 papers before you actually issue the injunction.

14:28:40 15 THE COURT: All I'm determining now is that I will
16 award injunctive relief. As to the scope of injunctive
17 relief, I'm going to give the parties an opportunity to make
18 their submissions. But based upon the proof, and particularly
19 the jury's finding on the proof, of willfulness, and the prior
20 submissions that the defendant's products offended the
21 patents, and the way the matter has proceeded, and the
22 evidence at trial, it's hard for me to imagine any set of
23 circumstances in which injunctive relief wouldn't occur. Now,
24 as to the exact wording of it and the scope of it, that's
25 something that I will give the parties an opportunity to be

1 heard.

14:29:27 2 MR. KITTREDGE: I've heard what you have said, and I
3 don't have anything to add. So --

14:29:49 4 THE COURT: Okay. Well, I think the last remarks that
5 I made, made explicit, were implicit in my earlier ruling on
6 injunctive relief, that I have considered irreparable injury,
7 remedy available at law, the balance of hardships, and the
8 public interest. As I said, I am reserving the precise scope
9 of it pending the parties' submissions. And of course, the
10 parties are free to file post-judgment motions to ask the
11 Court to revisit these issues.

14:30:29 12 Are there any other matters, either side?

14:30:31 13 MR. VEZEAU: No, Your Honor. we'll submit a draft
14 order, as I said. But I just wanted to take a moment to thank
15 the Court and staff for the courtesy you have shown all sides
16 in this case. We appreciate it.

14:30:51 17 THE COURT: As the saying goes, I get paid.

14:30:54 18 * * * * *

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14:30:54 25 REPORTER'S CERTIFICATE

14:30:54 1

14:30:54 2 I, Peggy G. Turner, Official Court Reporter for

14:30:54 3 the United States District Court for the Middle

14:30:54 4 District of Tennessee, with offices at Nashville, do

14:30:54 5 hereby certify:

14:30:54 6 That I reported on the Stenograph machine the

14:30:54 7 proceedings held in open court on April 30, 2009, in the

8 matter of ILIGHT V. FALLON, Case No. 2:06-0025; that said

9 proceedings in connection with the hearing were reduced to

10 typewritten form by me; and that the foregoing transcript,

11 Pages 1271 through 1290, is a true and accurate record of said

12 proceedings.

14:30:54 13 This the 21st day of May, 2009.

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S/Peggy G. Turner, RPR
Official Court Reporter

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